

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL NO. 220 OF 1990

IN

SPECIAL CIVIL APPLICATION NO. 897 of 1990

WITH

LETTERS PATENT APPEAL NO. 221 OF 1990

IN

SPECIAL CIVIL APPLICATION NO. 898 OF 1990

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL and

MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

NATIONAL INSURANCE CO.LTD.

Versus

AHMEDABAD ELECTRICITY COMPANY

Appearance:

MR RAJNI H MEHTA for Appellant

MR HB SHAH for Respondent No. 1

SERVED for Respondent No. 2

CORAM : MR.JUSTICE B.C.PATEL and
MR.JUSTICE C.K.BUCH
Date of decision: 24/12/98

ORAL JUDGEMENT (Per Patel, J.)

These appeals are filed by original respondent No.2 against the interim orders passed by learned Single Judge of this Court on 29.6.1990. In LPA No. 220/90 [arising from SCA No.897/90], the learned Single Judge directed the appellant to deposit a sum of Rs.7,54,203/in this Court while in LPA No. 221/90 [arising from SCA No.898/90], the respondent No.2 was directed to deposit a sum of Rs.7,87,198-16 in this Court, both within four weeks from the date of the order. The respondent No.1 herein [original petitioner] was permitted to withdraw the aforesaid amounts on furnishing security to the satisfaction of the Registrar. It was further directed that in case the respondent No.1 is required to repay the amounts, the same will have to be refunded to the appellant herein with interest at the rate of 12% per annum.

2. The respondent No.1, original petitioner is a Company registered under the Indian Companies Act and is a Public Limited Company having its registered office at Ahmedabad. The respondent No.1 [for brevity, AEC, hereinafter] is engaged in the business of generation and distribution of electrical energy within the licenced area of the cities of Ahmedabad and Gandhinagar and villages nearby these cities.

2.1. It appears that in view of the increased demand of electricity, AEC decided to set up a Thermal Power Station known as 'F' Station at its power house complex at Sabarmati, Ahmedabad. AEC entered into agreements and contracts with various parties who were manufacturers and suppliers of different types of machineries and they were required to carry out their contractual obligations as per the contract. The respondent No.1 [AEC] entered into an agreement with respondent No.2 on 2.5.1987 for supply of coal-handling plant which was to be set up at 'F' Station Project. It is the say of AEC that by way of advance a sum of Rs.25,00,000/- was paid to the respondent No.2 Company. According to the terms of the contract, respondent No.2 was to offer a guarantee.

2.2 So far as LPA No. 220/90 is concerned, a performance guarantee in the sum of Rs.7,54,203-00 was given by the appellant herein and the document of

guarantee was executed by the appellant on 12.10.1987, vide Annexure 'B' to SCA No. 897/90.

2.3 So far as LPA No. 221/90 is concerned, the appellant herein gave a performance guarantee in the sum of Rs.25,00,000/- and the agreement in this regard was executed on 23.7.1987. Copy of the Guarantee is produced at Annexure 'B' to SCA No. 898/90.

2.4 As breach was committed by the respondent No.2, the AEC invoked the Guarantees calling upon the appellant to make payment covered by the aforesaid Guarantees. The appellant failed to honour the guarantee by making the payment as demanded, and therefore, AEC approached this Court by filing the aforesaid petitions. Learned Single Judge, after hearing the parties, issued Rule and passed an interim order as aforesaid.

3. Mr. Mehta, learned advocate for the appellant submitted that :

- (i). the petitions under Article 226 of the Constitution is not maintainable as the petitioner is a Limited Company and cannot invoke Article 19 of the Constitution;
- (ii). There is no case of breach of a statutory duty, but it is a case merely covered by a pure and simple contract, and therefore, writ jurisdiction of this Court cannot be invoked;
- (iii). The question involved in these petitions is violation of a contract, and AEC can take appropriate action in the Civil Court;
- (iv). The Guarantee covered in LPA No. 220/90 was never invoked. [So far as Guarantee covered in LPA No. 221/90 is concerned, he fairly stated that it is not the case that it was not invoked]; and,
- (v). There is dispute between the respondents No.1 and 2 regarding outstanding dues, and, therefore, the appellant cannot be called upon to make payment by invoking the guarantee.

4. On behalf of AEC, the respondent No.1, it is submitted by learned Advocate Mr. Shah that :-

- (i). The Court at this stage is not required to go into the merits or demerits of the questions that may be raised in the writ petitions and the Court at this stage is required to consider the legality and validity of the order passed by learned Single Judge in exercise of powers under Article 226 of the Constitution.

- (ii). It is a case of promissory estoppel inasmuch as AEC has given contract to the respondent No.2 only on the appellant giving a guarantee of performance and the appellant cannot make a voltface and cannot be allowed to commit breach of promise by refusing to honour its commitments.
- (iii). There is enough material to show that both the Guarantees were invoked in time, i.e. before the date of expiry of the guarantee. [The date was extended, and before the extended date expired, the guarantees were invoked].

5. It is required to be noted that Performance Guarantee covered by LPA No. 221/91 specifically provided that "the amount of this Guarantee shall stand reduced from time to time against progressive adjustment of advance against the supply to be made by the supplier under the said contract". Moreover, the appellant agreed to "irrevocably and unconditionally guarantee payment of such amount to M/s. Ahmedabad Electricity Co. Ltd., as may be outstanding", and that too "immediately on demand in writing any or all monies payable as above without any demur, recourse or without any reference to the Supplier."

5.1 So far as the Guarantee covered by LPA No. 220/90 is concerned, the appellant herein undertook to pay M/s. The Ahmedabad Electricity Co. Ltd., an amount not exceeding Rs.7,54,203/- (Rupees Seven lacs fifty four thousand two hundred three only) against any loss or damage caused to or suffered by or would be caused to or suffered by M/s. The Ahmedabad Electricity Company Ltd. by reason of any breach by the said Contractor of any of the terms and conditions contained in the said Agreement. In this case, the appellant undertook to pay the amount due and payable under this guarantee without any demur, merely on a demand from M/s. The Ahmedabad Electricity Company Ltd., stating that "the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by M/s. The Ahmedabad Electricity Company Limited by reason of breach by the said Agreement or by reason of the contractor failure to perform the said agreement". The Guarantee further says that "any such demand made by the Surety shall be conclusive as regards the amount due and payable by the Surety under this guarantee".

6. In view of the express language used in the Guarantees, Mr. Shah submitted that so far as LPA No. 220/90 is concerned, the prayer in the relevant petition

was made for a direction to the appellant to satisfy the amount guaranteed, i.e. Rs.7,54,203-00 plus interest of Rs.36,295-24, totalling Rs.7,90,498-24. He further submitted that the amount guaranteed in the Performance Guarantee covered by LPA No. 221/90 is concerned is Rs.25 lakhs; however as the guarantee provided that the amount shall stand reduced against progressive adjustment of advance against the supply, AEC has claimed only Rs.7,87,198-16 plus interest Rs.26,009-88, totalling to Rs.8,13,208-04. He further submitted that there is sufficient documentary evidence on record to show that the guarantees were invoked and the appellant was called upon to pay the amount. From the documents which are placed on record, we are satisfied that both the guarantees were invoked in time i.e. before the date of expiry.

7. The contention of Mr. Mehta is that this Court has no jurisdiction. He submitted that this is a matter covered by a contract, and, therefore, this Court ought not to have passed any interim order. Mr. Mehta submitted that Article 226 of the Constitution cannot be invoked in the instant case.

7.1 To substantiate this argument, Mr. Mehta relied on the judgment in the case of L.I.C. OF INDIA vs. KIRAN SINHA reported in AIR 1985 SC 1265. The Apex Court in this case pointed out that "the High Court could not have in the circumstances of this case directed the payment of the money claimed under the insurance policies in question in a petition filed under Article 226 of the Constitution. The only remedy available to the respondent in this case was a suit before a civil Court."

7.2 Mr. Mehta also relied on the judgment in the case of DIVISIONAL MANAGER, NATIONAL INSURANCE CO. LTD. VS. MANGUBEN reported in AIR 1987 GUJ. 224, wherein following the aforesaid decision of the Apex Court, a Division Bench of this Court pointed out that the High Court cannot direct payment of amount by the Insurance Company to the claimant.

7.3 Mr. Mehta further submitted that when rights of the parties interse are covered by terms of the contract, then constitutional provisions cannot be invoked. He relied on the decision of the Apex Court in the case of BAREILY DEVELOPMENT AUTHORITY VS. AJAY PAL SINGH reported in AIR 1989 SC 1076. In that case, the brochure indicated estimated cost but when actual allotment was made, there was increase in the cost of house. In the brochure it was specifically mentioned that actual cost

may increase or decrease and in these circumstances, the Apex Court pointed out that the increase in cost by the development authority cannot be labelled as arbitrary and discriminatory. In paragraph 21 of the aforesaid decision the Apex Court pointed out as under:-

"There is a line of decisions where the contract entered into between the State and the persons aggrieved is non-statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple : Radhakrishna Agarwal v. State of Bihar (1977) 3 SCR 249 : (AIR 1977 SC 1496), Premji Bhai Parmar v. Delhi Development Authority (1980) 2 SCR 704 : (AIR 1980 SC 738 and D.F.O. v. Biswanath Tea Company Ltd. (1981) 3 SCR 662 : (AIR 1981 SC 1368).

7.4 Relying on the aforesaid para, Mr. Mehta submitted that a writ or order cannot be issued by this Court under Article 226 of the Constitution. Mr. Mehta went to the extent of saying that unless the quantum of liability has been determined and the amount if any recoverable by the AEC from the respondent No.2 has been determined, the question of making payment does not arise. He submitted that in view of what is submitted by him, the appeals should be allowed.

8. Mr. Shah submitted that this Court need not go into the merits of the case as the appellant has challenged interim order passed by the learned Single Judge.

8.1 In our opinion, a different consideration would arise if the writ petitions were disposed on merits. So far as interim orders are concerned, the Court has to decide whether the order is just and proper and whether the Court has passed an order having no jurisdiction. Mr. Shah submitted that the appellant is a Government Company and it is not proper for the appellant to say that it will not perform its duties. Mr. Shah submitted that if the appellant would not have given the guarantee, then AEC would not have given contracts to the respondent No.2. Thus, it is on the basis of the promise of the appellant that AEC gave contracts to the respondent No.2.

9. In the case of GUJARAT STATE FINANCIAL CORPORATION vs. M/S. LOTUS HOTELS PVT. LTD reported in

AIR 1982 GUJ. 198, the submission was made that court cannot exercise powers under Article 226 in case of breach of a contract. A Division Bench of this Court hearing the Letters Patent Appeals considered the liability of a Corporation to honour its obligation of extending finance. The Court pointed out the doctrine of estoppel by representation. The Division Bench held that where one person has made a representation to another person by words or by acts or conduct or with the intention, and with the result of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee from making, or attempting to establish by evidence, any averments substantially at variance with his former representation. The Division Bench confirmed the decision of the learned Single Judge. The matter was carried by the appellant before the Apex Court. Following the decision of the Apex Court in the case reported in AIR 1979 SC 1628, the Apex Court, in the reported decision in the case of GSFC VS. LOTUS HOTELS PVT LTD - AIR 1983 SC 848, pointed out in paragraph 11 that the rule inhibiting arbitrary action by the Government would equally apply where such corporation dealing with the public whether by way of giving jobs or entering into contracts or otherwise and the Court pointed out that it cannot act arbitrarily and its action must be in conformity with some principle which meets the test of reason and relevance. In the said case, in paragraph 12, the Apex Court held as under :

Now, if the appellant entered into a solemn contract in discharge and performance of its statutory duty and the respondent acted upon it, the statutory corporation cannot be allowed to act arbitrarily so as to cause harm and injury, flowing from its unreasonable conduct, to the respondent. In such a situation, the Court is not powerless from holding the appellant to its promise and it can be enforced by a writ of mandamus directing it to perform its statutory duty. A petition under Article 226 of the Constitution would certainly lie to direct performance of a statutory duty by "other authority" as envisaged by Article 12."

9.1 In view of the language used in the Guarantees which we have recorded above, it is apparent that the appellant gave solemn assurance to AEC to make payment on

demand without any demur, merely on a demand by the AEC. Public Corporations and Public Bodies should certainly see that the promise which is given is honored by them. The appellant cannot backout of its obligation. It is required to be noted that as pointed out in the petition, the respondent No.1 has incurred expenses and suffered a loss. It is in view of the failure of the respondent No.2 to discharge its obligation as per the contract that the Guarantees given by the appellant were invoked. AEC would be in a very disadvantageous position if the principle of promissory estoppel is not invoked as pointed out by the Apex Court in its decisions reported in AIR 1979 SC 621 and AIR 1980 SC 1285, and relying on these decision, the Apex Court held in GSFC's case [AIR 1983 SC 848] (supra) that the principle of promissory estoppel can be invoked.

9.2 Mr. Shah submitted that in the writ petitions, in paragraphs 15 and 16 [of SCA No.898/90], specific averments have been made, which are reproduced hereunder:- [Similar averments are made in paragraphs 14 and 15 of Spl. C.A. No. 897/90.]

'15. The petitioner submits that if such a guarantee had not come from the second respondent and if such guarantee was not given, no contract would have been given to the first respondent. The contract is worth Rs.3 Crores and more. Only because the first respondent offered the guarantees from a nationalised insurance company, the petitioner was feeling assured about the performance of the contract by the first respondent and the guarantees given by the second respondent.

16. The petitioner says that the petitioner company had changed its position to its prejudice and it had given contract only on the first respondent giving guarantees of the second respondent. This is a case of promissory estoppel; and the second respondent, therefore, cannot make a volte face and it cannot be allowed to commit breach of promise by refusing to honour its commitment solemnly given to the petitioner-Company'

10. Mr. Shah, relying on the decision of the Apex Court in GSFC's case submitted that it cannot be said that the Court has no jurisdiction or power or authority to pass an order. He has taken us through the whole judgment. It appears that the appellant is a Government

Company and for that there is no dispute. A Government Company must act in accordance with its solemn agreement. It is based on the solemn undertaking that the respondent No.1 AEC gave contract to the respondent No.2. The Apex Court pointed out in the case of SHIV SHANKER DAL MILLS. VS. STATE OF HARYANA reported in AIR 1980 SC 1037 that Article 226 grants an extraordinary remedy which is essentially discretionary, although founded on legal injury. It is perfectly open for the Court, exercising this flexible power to pass such order as public interest dictates and equity projects. In the aforesaid case which pertained to excess recovery of market fees, the Apex Court pointed out that where public bodies, under colour of public laws, recover people's moneys, later discovered to be erroneous levies, the Dharma of the situation admits of no equivocation; There is no law of limitation, especially for public bodies, on the virtue of returning what was wrongly recovered to whom it belongs. Nor is it palatable to our jurisprudence to turn down the prayer for high prerogative writs, on the negative plea of "alternative remedy" since the root principle of law married to justice, is ubi jus ibi remedium (paragraph 1 of the judgment).

11. Mr. Shah, learned advocate submitted that when a Government Company has given a solemn assurance by executing a Guarantee, the prayer for high prerogative writ should not be turned down on the negative plea of alternative remedy. It is a matter of faith in the commercial world and if a person who has executed a guarantee is refusing to honour the same on one or the other grounds, that is not permissible. When a Government Company has given a guarantee and has refused to honour its promise in the facts of these cases, and Apex Court's decision relied on by Mr. Shah, in our view, it cannot be said that the learned Single Judge has acted without jurisdiction in passing the impugned interim orders.

12. In the case of MAHABIR AUTO STORES VS. INDIAN OIL CORPORATION reported in AIR 1990 SC 1031, the Apex Court considered the plea that in private law field there was no scope for applying the doctrine of arbitrariness or mala fides, and pointed out that a plea of arbitrariness mala fides as being so gross cannot shift a matter falling in private law field to public law field; To permit otherwise would result in anomalous situation that whenever State is involved it would always be public law field, this would mean all redress against the State would fall in the writ jurisdiction and not in suits before Civil Courts; Whether public law or private law

rights are involved, in a case, depends upon the facts and circumstances of the case; The dichotomy between rights and remedies cannot be obliterated by any strait jacket formula; It has to be examined in each particular case. This Court has not to examine the details because such an examination would amount to deciding the Special Civil Application on merits. Learned Single Judge, while hearing the petition has to decide the matter on merits.

13. Mr. Shah submitted that so far as the Guarantee is concerned, the Apex Court in detail has pointed out in the case of HINDUSTAN STEEL WORKS CONSTRUCTION LTD. VS. TARAPORE & CO. reported in AIR 1996 SC 2268 that interference by Court is called for in case of fraud or where irretrievable injustice would be caused. In paragraph 12 of the judgment Hindustan Steel's case, the Apex Court quoted paragraph 21 of the decision in the case of U.P. Co-operative Federation Ltd. reported in 1988 (1) SCC 174, which reads as under :-

" An irrevocable commitment either in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with except in case of fraud or in case of question of apprehension of irretrievable injustice has been made out. This is well settled principle of law in England. This is also well settled principle of law in India. "

13.1 Mr. Shah submitted that this Government Company, instead of making payment in view of the guarantee dragged the respondent No.1 to the Court. In absence of clear case of fraud, appellant has abused the process of the Court not only by filing an appeal but also by taking an unreasonable stand before the learned Judge.

13.2 Mr. Shah has taken us through the entire entire judgment and submitted that it can be said that after considering the aforesaid principle and earlier decisions on the points, the learned Single Judge passed an interim order; It cannot be said without jurisdiction the Court has passed an order. He submitted that under Article 226, in a given case, writ/command can be issued against "any person" and not merely the State.

14. After considering the aforesaid judgments, the language used in the Performance Guarantees and the facts of the present case, in our studious opinion, it cannot be said that the interim order passed by the learned Single Judge is without jurisdiction. Ultimately, it will be for the learned Single Judge hearing the writ

petitions to finally decide whether or not to grant the prayers made in the petitions. At this stage, only an interim order is passed by the learned Single Judge to deposit the amounts, which have been permitted to be withdrawn by AEC after furnishing security to the satisfaction of the Registrar of this Court. Moreover, in having observed that the amounts will have to be refunded with 12% interest in the event of AEC losing in the petitions, even the interest of the appellant herein is adequately protected. In the circumstances, we are of the opinion that the learned Single Judge has exercised the jurisdiction in accordance with law and the order does not suffer from any infirmity, and must be confirmed.

15. Before parting with this judgment, we may observe that while respondent No.2 is shown as served in LPA No. 220/90, it is shown that respondent No.2 is not served in LPA No. 221/90. However, from the record it is apparent that the respondent No.2 has been served by Registered AD. The Court Shirestedar has pointed out from the record that Respondent No.2 has been served in both the matters; hence no further question arises in this regard. Even otherwise also, Mr. Shah has pointed out that no relief is claimed against the respondent No.2 in these appeals.

15. Both the appeals are dismissed with cost, which is quantified at Rs.5000/- (Rupees five thousand only) each.

16. Mr. Mehta, learned advocate for the appellant requests that the order passed by this Court may be stayed for a period of ten weeks so as to enable the appellant to approach the higher forum. Mr. Shah objected to the same; however, he stated that if the Court grants such time, the same should not be extended thereafter. In the circumstances, we suspend the order for a period of ten weeks from today.

csm./ -----